No. 79-169

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

NEW HAMPSHIRE ELECTRIC COOPERATIVE, INC.,
TOWNS OF ASHLAND AND WOLFEBORO, NEW HAMPSHIRE,
VILLAGE PRECINCT OF NEW HAMPTON,
NEW HAMPSHIRE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR NEW HAMPSHIRE ELECTRIC COOPERATIVE, INC., TOWNS OF ASHLAND AND WOLFEBORO, NEW HAMPSHIRE, AND VILLAGE PRECINCT OF NEW HAMPTON, NEW HAMPSHIRE IN OPPOSITION

ROBERT C. McDIARMID
SPIEGEL & McDIARMID
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 333-4500

Counsel for
NEW HAMPSHIRE ELECTRIC
COOPERATIVE, *et al.*

DI CESARE - Printing - Washington, D.C. 20006 (202) 331-8101

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79—169

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

NEW HAMPSHIRE ELECTRIC COOPERATIVE, INC.,
TOWNS OF ASHLAND AND WOLFEBORO, NEW HAMPSHIRE,
VILLAGE PRECINCT OF NEW HAMPTON,
NEW HAMPSHIRE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR NEW HAMPSHIRE ELECTRIC COOPERATIVE, INC., TOWNS OF ASHLAND AND WOLFEBORO, NEW HAMPSHIRE, AND VILLAGE PRECINCT OF NEW HAMPTON, NEW HAMPSHIRE IN OPPOSITION

Petitioner initiated this proceeding by a filing at the Federal Power Commission ("the FPC" or "the Commission")[1] of a revised "fuel clause" to replace a previous fuel

[1]The Federal Energy Regulatory Commission is the statutory successor of the FPC.

clause, together with a "surcharge", the validity of which is the subject of the instant petition. Petitioner, as the Commission (Pet. App. p.69a)[2] and the court below (Pet. App. pp. 17a-18a) noted, received, during the three year period its previous rate and fuel clause had been in effect, 36 months of fuel clause revenues. In its filing, however, Petitioner asserted the right to charge its customers for two additional months of fuel clause revenues *after* the original rate and fuel clause had been superseded by its new filing in addition to the revenues it received under its new filing. The new filing, of course, because it was determined on a current basis, was expected to recover even higher revenues each month than had the old rate.

Petitioners urge (1) that the Commission held (Pet., p. 3) that it was "powerless" to allow Petitioner to recover some $1.6 million which it had incurred in fuel expenses, and (2) that there is a conflict of Circuits. Each argument is misleading and inaccurate.

The argument below by Petitioner was basically that it had filed a different kind of rate clause, a claim the Commission (Pet., p. 61a) and the court below (Pet. App., pp. 11a-24a) found "... not true" (Pet. App. p. 11a). Consequently, there is no holding, as there could not be, that unless the surcharge were allowed, "Public Service would never recover $1.6 million in fuel expense incurred for wholesale service." (Pet., p. 4). Since Petitioner sought the right to recover its surcharge as a matter of law based on its claim as to the form and legal status of its previous rate, no party ever suggested going back over the three year period in which its previous fuel clause had been in

[2]The decisions below are cited herein to the Petition Appendix as "Pet. App., p. ____ ".

effect to determine whether or not Petitioner, as a result of all portions of its wholesale rate, had fully recovered, over-recovered, or under-recovered its costs. The Commission found, and the court below agreed, that the claim made by Petitioner as to its rate form and status was simply inaccurate. On the basis of the claims urged by Petitioner below, that was enough to deny its claimed surcharge.

Nor is there merit to the claim of conflict of Circuits here. While there certainly does appear the potential for a conflict in Circuits, the decision below is consonant with the decisions of the Third Circuit, *Jersey Central Power & Light Co. v. F.E.R.C.*, No. 78-1185 (3d Cir., December 8, 1978) and the Fourth Circuit, *Virginia Electric & Power Co. v. F.E.R.C.*, 580 F.2d 710 (4th Cir. 1978). Petitioner's claim of a conflict rests upon its analysis of the decision of the first Circuit in *Maine Public Service Co. v. F.P.C.*, 579 F2d 659 (1st Cir. 1978). Unfortunately, that "conflict" would not assist Petitioner here even if resolved in its favor.

The First Circuit, as Petitioner notes, remanded that case to the Commission for fuller elucidation of certain issues. The First Circuit asserted that the Commission should have focused upon the reasonable expectations of wholesale and retail consumers on the one hand, and the legitimate needs of the utility on the other; upon the justness and fairness of the claims; and upon the comparison of the retroactive features of the surcharge with the Commission's own regulatory policies and the public interest. Petitioner notes as much at Pet., p. 8. But the fact of the matter is that the Commission has here made findings on each of these matters as to Petitioner. Thus the Commission did examine the propriety of attempts to visit costs from one period upon the customers

of another period (Pet. App., p. 64a), noted that Petitioner had conceded that customers had paid all rates due and owing (Pet. App., p. 55a), discussed the basis for its own fuel adjustment regulations as compared to this clause (Pet. App., p. 60a), and noted and dealt with Petitioner's claim of "mistake" as to its initial application of its earlier fuel clause (Pet. App., p. 69a). While there may well be an inherent conflict between the decision of the First Circuit and the decisions of the District of Columbia, Third and Fourth Circuits, a conflict of this sort does not assist Petitioner here. Petitioner would require a writ of error, rather than one of certiorari, for effective relief here; the two are not usually interchangeable. There is, however, a case now pending before the First Circuit which is, in most respects, identical to the cases decided by the District of Columbia Circuit below, and which will demonstrate whether or not a conflict does in fact exist. *Boston Edison Company v. F.E.R.C.*, First Cir. Nos. 79-1179, 79-1287. If there is to be a conflict, it will be revealed in the First Circuit's decision in that case, not here.

For the foregoing reasons, the Petition for Writ of Certiorari sought in this proceeding should be denied.

Respectfully submitted,

ROBERT C. McDIARMID

Attorney for
THE NEW HAMPSHIRE
ELECTRIC COOPERATIVE, INC.,
TOWNS OF ASHLAND and WOLFE-
BORO, NEW HAMPSHIRE, and the
VILLAGE PRECINCT OF
NEW HAMPTON, NEW HAMPSHIRE,
Intervenors.

August 31, 1979

Law Offices Of:
SPIEGEL & McDIARMID
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 333-4500